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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THOMAS L. KELLEY &
ASSOCIATES, INC., a California
Corporation; VINCENT ORTEGA, an
individual,

Plaintiffs,

vs.

BSN MEDICAL INC., a Delaware
Corporation; and DOES 1 through 100,
inclusive,

Defendants.

CASE NO: CV08-4419 GW (AGRx)

**DEFENDANT'S REPLY IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT OR, ALTERNATIVELY,
PARTIAL SUMMARY JUDGMENT:**

**(1) MEMORANDUM OF
POINTS AND AUTHORITIES**

**(2) SUPPLEMENTAL
DECLARATIONS OF:**

- BRYAN SHERREL
 - JENNY M. BECK
 - MATTHEW C. KANE
- [Under Separate Covers]

**(3) EVIDENTIARY OBJECTIONS
TO AND MOTION TO STRIKE
DECLARATIONS OF:**

- THOMAS L. KELLEY
 - VINCENT ORTEGA
 - TIMOTHY PORTER
- [Under Separate Covers]

**(4) RESPONSE TO PLAINTIFFS'
SEPARATE STATEMENT OF
GENUINE ISSUES**
[Under Separate Cover]

**(5) RESPONSE TO OBJECTIONS
TO DECLARATIONS OF GARY
KEYTEL, BRYAN SHERRELL
AND JENNY BECK**
[Under Separate Cover]

Date: June 29, 2009

Time: 8:30 a.m.

Ctrm.: 6

Judge: Hon. George Wu

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1 **I. INTRODUCTION**

2 Plaintiffs' Opposition to BSN's Motion for Summary Judgment confirms that
3 summary judgment should be granted in favor of BSN on all of Plaintiffs' claims.

4 First, Plaintiffs admit that their respective TKA-Parker Agreement and Ortega-
5 Parker Agreement (collectively, the "Parker Agreements") did not impose any
6 obligation on BSN to pay Plaintiffs commissions on any sales made to customers
7 after Plaintiffs' relationships with BSN were terminated. They further admit that they
8 had no agreement with BSN to pay them any such post-termination commissions.
9 Because all of their purported claims depend on the existence of and/or are untenable
10 in the absence of such an agreement, all of Plaintiffs' claims fail as a matter of law.

11 Second, Plaintiffs demonstrate that they fundamentally lack any understanding
12 of their purported claim under the California Independent Wholesale Sales
13 Representative Act (the "Act"). Contrary to what Plaintiffs may believe, the Act
14 does not create an independent obligation to pay commissions where, as here, no
15 contractual obligation of any type exists to do so. Moreover, any purported claim
16 under the Act can only be limited to one for treble damages for BSN's alleged failure
17 to enter into written agreements with them, and nothing else. However, the
18 uncontroverted facts establish, as a matter of law, that Plaintiffs' claim under the Act
19 is *time-barred*, they have *no damages* that could be trebled under the Act, BSN did
20 not "willfully" fail to enter into written contracts with them, they were not "wholesale
21 sales representatives" protected by the Act, and Plaintiff TKA cannot retroactively
22 apply the provisions of the Act to its pre-existing TKA-Parker Agreement. Indeed,
23 all of this is established by Plaintiffs' damning deposition testimony admissions,
24 which they knowingly, intentionally and improperly seek to retreat from using
25 contradictory declarations submitted in opposition to this motion.

26 Third, Plaintiffs admit that they did not have any joint venture or confidential
27 relationship with BSN. As such, their breach of fiduciary duty claim fails as a matter
28 of law as well.

1 Fourth, given Plaintiffs' admissions as to the existence and scope of the terms
 2 of the Parker Agreements, Plaintiffs' purported quantum meruit claim fails as a
 3 matter of law. The claim further fails because the uncontroverted facts also establish
 4 that Plaintiffs entered into their respective Novation Agreements with BSN, which
 5 were supported by adequate consideration.

6 Finally, Plaintiffs offer no opposition to granting summary judgment against
 7 them on their purported accounting claim, for which they have no demonstrated
 8 need.

9 Therefore, as we further discuss below, summary judgment should be granted.

10 **II. ARGUMENT**

11 **A. Applicable Legal Standards**

12 Mere allegations, and denials, for example, "that the contract was breached,
 13 that a fraud was committed, or that some fiduciary duty was breached do not alone
 14 establish the existence of a genuine dispute of material fact." *Radobenko v.*
 15 *Automated equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1975). Instead, they
 16 merely "frame the ultimate issues to be determined by applying the relevant rules of
 17 law to the established facts." *Id.* As a result, any contention by Plaintiffs that the
 18 existence of "ultimate issues raises questions of fact which bar summary judgment is
 19 without merit." *Id.* The proper test is "whether . . . there exists a genuine dispute of
 20 material *fact*." *Id.* (emphasis added). "Disputes over irrelevant or unnecessary facts
 21 will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pacific*
 22 *Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987).

23 Furthermore, any proof of a genuine issue of material fact must be supported
 24 by the record. Statements submitted in declarations made by the party opposing
 25 summary judgment that are inconsistent with that party's sworn deposition testimony
 26 cannot be used to defeat a motion for summary judgment. *Kennedy v. Allied Mut.*
 27 *Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991).

28 Applying these standards, Plaintiffs' Opposition fails to establish the existence

1 of any genuine issue of material fact to be decided by the trier of fact. Therefore,
 2 BSN is entitled to summary judgment against Plaintiffs as a matter of law.

3 **B. The Second Cause Of Action For Breach Of Oral Contract Fails As**
 4 **A Matter Of Law Because Plaintiffs Admit No Such Contract Exists**

5 As we discussed in our opening briefing and we discuss further in Section C,
 6 *post*, Plaintiffs’ purported First Cause of Action for violation of the Act is entirely
 7 *derivative* of and *dependent* upon their ability to establish BSN’s liability on their
 8 underlying Second Cause of Action for Breach of Oral Contract, which seeks
 9 allegedly unpaid commissions on sales made to BSN customers who signed LOC’s
 10 after the termination of Plaintiffs’ relationships with BSN. Thus, notwithstanding
 11 Plaintiffs’ efforts to “put the cart before the horse” with their purported First Cause
 12 of Action for violation of the Act, we will once again discuss their predicate Second
 13 Cause of Action for Breach of Oral Contract first.

14 In that respect, Plaintiffs’ Opposition admits that their breach of oral contract
 15 claim seeks to have them “be paid a commission on the post-termination sales made
 16 to BSN purchasers who signed LOCs, and for the duration of the LOCs.” Oppos.
 17 (Doc. #29) at 3:4-7; *see also id.* at 3:13-14 (“the factual question as to whether
 18 Plaintiffs should be paid commissions on the LOCs ...”), 14:26-15:2 (“Plaintiffs ...
 19 have never been paid for any sales made pursuant to the LOCs following their
 20 termination ...”). However, as we showed in our opening briefing, Plaintiffs’ had ***no***
 21 ***agreement*** with BSN, S&N or Parker to pay them commissions ***after the***
 22 ***termination of their relationship***. *See* Motion (Doc. #28) at 17:18-18:1, 18:18-28
 23 (fn. 10). Not only are the underlying facts supporting this conclusion ***uncontroverted***
 24 by Plaintiffs, (*see* Plaintiffs’ Statement of Genuine Issues [“GI’s”] 21-25, 50-51), but
 25 their Opposition brief unequivocally ***admits*** that they had ***no such agreement***:

26 “The Plaintiffs ... ***cannot and do not claim that there was a specific***
 27 ***agreement between the parties regarding the payment of post-***
 28 ***termination commissions.***” Oppos. at 15:7-10 (emphasis added).

That further damning admission is the death-knell of not only Plaintiffs’

1 breach of oral contract claim, but their entire case. *See, e.g., Nein v. HostPRO, Inc.*,
 2 ____ Cal.App.4th. ____, 2009 WL 1533039, *10 (June 3, 2009) (“[W]e conclude as a
 3 matter of law that the ... agreement precludes plaintiff from collecting additional
 4 commissions post-termination” because it “is reasonably susceptible to only one
 5 interpretation – that once plaintiff ceased to be employed by defendant, he would no
 6 longer be eligible for commission pay”). Notwithstanding, Plaintiffs incorrectly
 7 contend that “[t]his does not logically vitiate [their] breach of contract cause of
 8 action” because “[t]he Court has a duty to fill in the gaps to effect the ultimate
 9 intentions of the parties on an issue not contemplated by the Parties ...” *Oppos.* at
 10 15:10-15). This concocted theory is legally untenable and unsubstantiated, and the
 11 Court should reject it *in toto*.

12 Indeed, Plaintiffs profoundly misconstrue the Court's role in interpreting
 13 contracts. As discussed above and in our opening briefing, they *admit* that their oral
 14 agreements with BSN *only* provided for the payment of commissions to them *during*
 15 *their relationships* and *not post-termination*. Yet, even though they *never* sought and
 16 reached an agreement with BSN, S&N or Parker on the payment of commissions
 17 post-termination (other than their respective Novation Agreements), Plaintiffs want
 18 the Court to “interpret” their respective Parker Agreements as if they contain such a
 19 provision for sales made post-termination to customers who signed LOC’s. Thus,
 20 they really seek to have the Court *rewrite* their agreements to include an additional
 21 term which they never agreed to, and which is not necessary to effectuate the terms
 22 for the payment of commissions on sales made *during their relationships* with BSN
 23 to which the parties actually agreed.

24 However, it is *not*, as Plaintiffs suggest, the Court's duty to “fill in the gaps” on
 25 terms on which the parties *never intended* to reach agreement. They rely only on
 26 *State Farm Fire and Casualty Co. v. Tan*, 691 F.Supp. 1271 (S.D. Cal. 1998), which
 27 actually held that the Court's “duty to fill in the gaps of the contract” must be guided
 28 by the parties' “overall intentions.” *Id.* at 1273 (noting that the purpose is to

1 "effectuate the overall intentions of the contracting parties") (emphasis added). The
 2 mere fact that one party to a contract contends that a "gap" exists in its terms does
 3 not give the Court license to "fill" it with *new and additional terms* which the parties
 4 *never agreed to* absent a clear and manifest *bilateral intent* by the parties to have
 5 provided such terms in their agreement. *Id.* (noting that courts must be careful to not
 6 "venture beyond construing the contract to effectuate the manifest intention of the
 7 parties"). Indeed, while Plaintiffs may have "20-20 hindsight" on the issue of being
 8 paid commissions post-termination, the fact remains that they chose to not address it
 9 at the time of entering into their Parker Agreements, and the Court has no duty to
 10 cure their new-found "buyer's remorse" because its focus must be on the parties'
 11 intent *at the time they entered into their agreements*. *Id.* ("The court must determine
 12 what the parties bargained for when they agreed to the terms of the [agreement]").

13 It is uncontroverted that the terms of Plaintiffs' respective Parker Agreements
 14 *only* provided for the payment of commissions on sales made *during the term of their*
 15 *relationships* with BSN, and *not on post-termination sales*. This reflects the parties'
 16 intent to not agree to any obligation to make post-termination commission payments.
 17 That intent cannot be "interpreted" out of those agreements by *rewriting* them to
 18 include *new and additional terms* on which the parties *never intended to agree*.
 19 Therefore, Plaintiffs' Second Cause of Action for Breach of Oral Contract fails as a
 20 matter of law and summary judgment should be granted in favor of BSN.

21 **C. The First Cause Of Action For Violation Of The Act Fails As A**
 22 **Matter Of Law**

23 **1. The Act Provides Only Additional Remedies For An**
 24 **Otherwise Valid Breach Of Contract Claim, Which Plaintiffs**
Could Only Seek In This Case Based On BSN's Alleged
Willful Failure To Enter Into Written Contracts With Them

25 Plaintiffs' Opposition demonstrates their fundamental lack of understanding of
 26 the provisions of the Act and what they can seek under the circumstances *sub judice*.
 27 Indeed, Plaintiffs apparently believe, notwithstanding their admission that they had
 28 no agreement with BSN to pay them any commissions on sales made post-

1 termination, that the Act somehow creates an independent statutory obligation for
2 BSN to pay them such commissions. The Act creates no such obligation.

3 As we discussed in our opening briefing, the Act only provides one substantive
4 remedy: “*treble damages proved at trial*” against a manufacturer that “*willfully fails*
5 *to enter into a written contract* as required by” the Act or that “*willfully fails to pay*
6 *commissions as provided in the written contract*”. Cal. Civ. Code § 1738.15
7 (emphasis added). Plaintiffs do not dispute that the only damages that could be
8 “proved at trial” and trebled under the Act in this case are for unpaid *commissions*.
9 Oppos. at 4:21-5:13. Thus, a predicate to an award of treble damages pursuant to the
10 Act is the breach of an agreement to pay commissions and resulting damages in the
11 form of unpaid commissions, making any purported “cause of action” for violation of
12 the Act wholly dependent on and derivative of a successful breach of contract claim.
13 Therefore, Plaintiffs’ assertion that their purported “cause of action for a violation of
14 [the Act] rests on its own merits in this case” is plainly wrong. Oppos. at 5:12-13.
15 At most, the Act provides only *additional remedies* for a successful breach of
16 contract claim.¹

17 Plaintiffs’ confusion about the Act is well-exemplified by their assertion that
18 “BSN violated the statute in multiple ways – ... *both by failing to have a contract*
19 *setting forth when and how commissions would be paid*, as well as *failing to pay*
20 *those commissions*.” Oppos. at 5:13-15 (emphasis added). Yet, because Plaintiffs
21 admit that they *did not have a written contract* with BSN, (GI’s 40, 56), any remedies
22 they seek under the Act can *only* be based on BSN’s alleged “*willfully fail[ing] to*
23 *enter into a written contract* as required by” the Act. Cal. Civ. Code § 1738.15
24 (emphasis added). They would *not* be entitled to any remedy under the Act merely
25

26
27 ¹ Thus, the only reasonable interpretation of the Act’s references to a “civil action” in Cal. Civ.
28 Code §§ 1738.15 and 1738.16 is that it means a civil action for a breach of contract (oral or
written).

1 for BSN's "failing to pay those commissions" because the Act's remedies on this
 2 basis are limited to if BSN "willfully fail[ed] to pay commissions *as provided in the*
 3 *written contract*" required under the Act, which Plaintiffs admit they did not have.²
 4 *Id.* (emphasis added); GI Nos. 40, 56.

5 This principle is well illustrated in *Weiner v. Midwest Film Corp.*, 1995 WL
 6 549036 (N.D. Ill. 1995). In that case, Weiner sued Midwest Film Corporation
 7 ("MFC"), seeking compensatory and treble damages under the Act. *Id.* at *1. Like
 8 the Plaintiffs here, Weiner argued that he had a cause of action under the Act based
 9 on MFC's failure to pay him commissions that were allegedly due under an *oral*
 10 *contract*. *Id.* at *4. In rejecting Weiner's contention, the District Court held:

11 [T]he California Act does not mention breach of an *oral* contract – *only*
 12 *failure to enter into a written contract or breach of a written contract*
 13 *can form the basis for liability under the Act*. Since there was ***no***
 14 ***written contract*** between MFC and Weiner, the ***only*** cognizable claim
 under the California Act is for MFC's ***failure to enter into a written***
contract. *Id.* (emphasis added).

15 Therefore, any liability Plaintiffs may seek to impose on BSN under the Act
 16 can *only* be based on its alleged "willfully fail[ing] to enter into a written contract as
 17 required by" the Act and *not* failing to pay commissions pursuant to any oral or
 18 implied contract. Cal. Civ. Code § 1738.15. As we further discuss below, no such
 19 liability can be imposed on BSN under the Act as a matter of law.³

20
 21 ² As we further discuss *post*, Plaintiffs' purported claim under the Act fails as a matter of law
 22 because it is time barred, Plaintiffs have no evidence that BSN willfully violated the Act, there is
 23 no valid predicate breach of contract claim for damages that could be trebled under the Act,
 Plaintiffs were not "wholesale sales representatives" protected by the Act, and the Act cannot be
 applied retroactively to the TKA-Parker Agreement.

24 ³ Plaintiffs' cited cases of *Schoenduve Corporation v. Lucent Technologies, Inc.*, 442 F.3d 727 (9th
 25 Cir. 2006), and *Brooks v. Motsenbocker Advanced Developments, Inc.*, 2008 WL 2826392 (S.D.
 26 Cal. 2008), do not contradict BSN's arguments and are inapposite for at least two reasons: (1)
 27 they neither raise nor decide the issue of whether the Act creates a separate cause of action for its
 28 violation or just additional remedies for a predicate breach of contract; and (2) their holdings and
 reasoning are *consistent* with the premise that the Act effectively provides only additional
remedies to a valid breach of contract or implied contract claim. Indeed, *Schoenduve* involved
 the District Court's review of an arbitrator's award making only an award of attorneys' fees under

1 **2. The Claim Is Time-Barred Under The Three-Year Statute Of**
 2 **Limitations Because It Accrued No Later Than When**
 3 **Plaintiffs' Relationship With BSN Began in 2001, Seven Years**
 4 **Before They Brought This Action**

5 Assuming, *arguendo*, that a separate cause of action exists under the Act,
 6 Plaintiffs' claim is nonetheless *time-barred*. Plaintiffs agree that such a claim would
 7 be subject to the three-year statute of limitations under Cal. Code Civ. Proc. § 338(a).

8 Recognizing the merit of BSN's argument that Plaintiffs' claim accrued no
 9 later than in April 2001, when their relationships with BSN started upon its
 10 assumption of their respective Parker Agreements, Plaintiffs incorrectly attempt to
 11 assert that their claim is nevertheless timely under a "continuing violation" theory.
 12 Oppos. at 10:22-11:4. In support of this, they argue that they "have not sued for any
 13 commissions owed prior to their termination" in June 2006, and "that *statutory*
 14 *violations occurred within three years prior to filing suit – BSN failed to have a*
 15 *written contract with Plaintiffs during that three year period, and failed to pay*
 16 *commissions to Plaintiffs during that period.*" *Id.* at 11:5-13 (emphasis added).
 17 These arguments further demonstrate Plaintiffs' lack of understanding of the Act.

18 As we discussed in our opening briefing and further above, *only* BSN's alleged
 19 *willful failure to enter into a written contract* as required under the Act can form the
 20 basis for any liability under the Act. Cal. Civ. Code § 1738.15. Therefore, any
 21 alleged *failure to pay commissions* during the three-year period prior to the filing of
 22 this action *cannot* be the basis for any liability under the Act or provide any basis for
 23 application of the "continuing violation" theory. As Plaintiffs admit, their
 24 relationships with BSN commenced in *April 2001*, upon its assumption of their
 25 respective Parker Agreements from S&N. GI's 21-32, 50-56. *At that time*, any

26 the Act, and therefore involved different circumstances, including a highly deferential review of
 27 the arbitrator's award, which do not exist in this case. In *Brooks*, the District Court granted
 28 summary judgment in favor of the defendant because the plaintiffs were not "wholesale sales
 representatives" under the Act.

1 alleged obligation of BSN under the Act to enter into written contracts with
 2 Plaintiffs, and any claim for its willful failure to do so, would have arisen and
 3 *accrued*. Under Plaintiffs completely unsubstantiated “continuing violation” theory,
 4 they effectively claim that a new obligation to enter into a written contract arose each
 5 time a customer serviced by them placed an order with BSN. Not surprisingly, no
 6 court has ever interpreted the Act’s requirements in this tenuous manner.

7 In fact, the District Court in *Weiner, supra*, 1995 WL 549036, ruled on this
 8 very issue, *rejecting* the argument that liability for failure to enter into a written
 9 contract required under the Act did not accrue until there was a failure to pay
 10 commissions. In that case, Weiner sued MFC over four years after entering into his
 11 relationship with MFC, for its alleged failures to pay him commissions and to enter
 12 into a written contract with him. MFC moved for summary judgment on the ground
 13 that Weiner's claim under the Act was *time-barred*, which the District Court *granted*:

14 Since there was no written contract between MFC and Weiner, the only
 15 cognizable claim under the California Act is for MFC's *failure to enter*
 16 *into a written contract*. The facts alleged in Weiner's own pleadings
 reveal that *this violation occurred no later than June 1990, when*
Weiner and MFC entered into their oral agreement.

17 *Id.* at *4 (emphasis added). Indeed, the *Weiner* court further noted that:

18 Weiner complains that finding that his California Act claim accrued
 19 when the oral contract was entered into “is absurd ... [because] a party
 20 could breach an oral contract after the limitations period expired and
 21 escape liability to a performing party.” ... Weiner is incorrect,
 22 however, because count III is not a claim for breach of an oral contract.
 Rather, it is a claim under a statute requiring manufacturers to enter
 into written contracts with their sales agents. The absurd result Weiner
 complains of simply does not arise because a performing party has a
 common law cause of action for breach of contract. *Id.*, fn. 2.

23 Thus, Plaintiffs’ purported claim under the Act for failure to enter into a
 24 written contract accrued no later than in *April 2001, when BSN assumed their*
 25 *respective Parker Agreements*. This violation could have occurred only once, *at that*
 26 *time*, and Plaintiffs *waited over seven years* to commence this action. As such, their
 27 claim is *time-barred* and summary judgment should be granted in favor of BSN.

1 **3. The Claim Fails Because Plaintiffs Admit They Had No**
 2 **Contracts Obligorating BSN To Pay Them Commissions On**
 3 **Sales Made Post-Termination, And Therefore Have No**
 4 **Damages That Could Be Trebled Under The Act**

5 Even assuming, *arguendo*, that Plaintiffs' purported claim under the Act is not
 6 time-barred, it still fails as a matter of law. As we discussed in our opening briefing
 7 and further above, the Act does not create an independent statutory obligation to pay
 8 commissions. Rather, it is wholly derivative of and provides additional remedies for
 9 an otherwise valid breach of contract claim for unpaid commissions, in the form of
 10 "treble the damages proved at trial." Cal. Civ. Code § 1738.15.

11 As we discussed in Section B, above, and as Plaintiffs admit in their
 12 Opposition brief, Plaintiffs had *no agreement* with BSN to pay them commissions on
 13 any sales made post-termination, other than as agreed in their Novation Agreements.
 14 Therefore, Plaintiffs have *no damages* which could be *trebled* under the Act as a
 15 matter of law and summary judgment should be granted in favor of BSN.

16 **4. The Claim Fails Because Plaintiffs Have No Evidence That**
 17 **BSN "Willfully" Failed To Enter Into Written Contracts With**
 18 **Them, If Required To Do So Under The Act**

19 To be entitled to *treble damages* under the Act, Plaintiffs must be able to
 20 prove that BSN *willfully* failed to enter into written contracts with them, if it was
 21 required to do so under the Act (which it was not). Cal. Civ. Code § 1738.15.
 22 Recognizing that they have no such evidence, Plaintiffs ask the Court to interpret
 23 "willfully" as used in the Act to mean merely "the failure to act" as required under
 24 the Act. Oppos. at 13:17-19. However, such an interpretation would render the
 25 Act's use of the word "willfully" to be *meaningless surplusage*, effectively creating a
 26 strict liability standard for *any* failure to comply with the Act, which could have been
 27 accomplished without using the word "willfully" in the first instance. *See Bosley*
 28 *Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 681 (9th Cir. 2005) ("We try to avoid,
 where possible, an interpretation of a statute that renders any part of it superfluous
 and does not give effect to all of the words used ...") (internal quotation marks and

1 citation omitted). Thus, the “willfully” standard was undeniably intended to impose
 2 a higher threshold for imposing treble damages liability. *See, e.g., Walters v. Am.*
 3 *Ins. Co.*, 185 Cal.App.2d 776, 783 (1960) (“willful” as used in insurance statute
 4 “connotes something more blameworthy than ... ordinary negligence, and *something*
 5 *more than the mere intentional doing of an act* constituting such negligence”) (emphasis added); *Cope v. Davison*, 30 Cal.2d 193, 201 (1947) (“willful” as used in
 6 vehicle statute implied an intent that “*relates to the misconduct and not merely to the*
 7 *fact that some act was intentionally done*”) (emphasis added).

9 Indeed, such a higher threshold likely was intended because treble damages are
 10 *intended to punish* and are therefore more akin to **punitive damages**. *See, e.g., Circle*
 11 *Oaks Sales Co. v. Smith*, 16 Cal.App.3d 682, 684 (1971) (noting that treble damages
 12 are “punitive and exemplary in nature”); *Caldwell v. Walker*, 211 Cal.App.2d 758,
 13 762 (1963) (describing treble damages provision in timber statute as a “penalty”). It
 14 is well-settled that such damages “are proper only when the ... conduct rises to levels
 15 of *extreme indifference to the plaintiff’s rights*, a level which decent citizens should
 16 not have to tolerate.” *Tomaselli v. Transamerica Insurance Co.*, 21 Cal.App.4th
 17 1269, 1287 (1994) (emphasis added). *See also Ebaugh v. Rabkin*, 22 Cal.App.3d
 18 891, 894 (1972) (“willful” as used in punitive damages statute meant the “act
 19 complained of must not only be *willful in the sense of intentional*, but it must also be
 20 *accompanied by aggravating circumstances, amounting to malice*”) (emphasis
 21 added); *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal.App.4th 1004,
 22 1055 (2009) (exemplary damages require “that the wrong was *committed willfully or*
 23 *with a design to injure*”); *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197,
 24 1223 (2009) (conduct supporting punitive damages must be “done with *willful and*
 25 *conscious disregard* of the rights or safety of others or *despicable conduct done in*
 26 *conscious disregard* of a person’s rights”) (emphasis added).

27 Here, the uncontroverted evidence shows only that Plaintiffs did not have
 28 written contracts with BSN, that Plaintiffs and BSN never requested of each other

1 that they enter into such contracts, and that BSN never indicated that it was unwilling
 2 to enter into such contracts. GI's 40-42, 56-58. Such evidence does not and cannot
 3 establish BSN's "willful" failure to enter into written contracts with Plaintiffs under
 4 the foregoing standards.

5 Realizing this, Plaintiffs argue instead that "[t]he best statutory analogy" to
 6 what "willfully" means under the Act is what it means in its use in Cal. Lab. Code §
 7 203 ("Section 203"), which they incorrectly assert means the "failure to act upon law
 8 itself."⁴ Oppos. at 13:10-19. They argue that this incorrect standard should apply
 9 because of manufacturers' "proactive" conduct required *each month* under the Act,
 10 including providing written information with each commission payment. However,
 11 it is uncontroverted that BSN complied with those requirements by providing
 12 detailed monthly commission payment reports to Plaintiffs. GI's 83-86. Indeed,
 13 even applying the actual meaning of "willfully" under Section 203, Plaintiffs' claim
 14 still fails because "[t]he settled meaning of 'willful,' as used in section 203, is that an
 15 employer has *intentionally failed or refused to perform an act* which was required
 16 to be done." *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1201 (2008)
 17 (emphasis added). Here, Plaintiffs have no evidence (circumstantial or otherwise)
 18 that BSN "*intentionally failed or refused*" to enter into written contracts with them.

19 Moreover, even if the Section 203 "willfully" standard applies under the Act
 20 (which it does not), it is well-settled that "[a] good faith belief in a legal defense will
 21 preclude a finding of willfulness." *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314,
 22 325 (2005) (citation omitted). "A 'good faith dispute' ... occurs when an employer
 23 presents a defense, based in law or fact which, if successful, would preclude any
 24 recovery ... The fact that a defense is ultimately unsuccessful will not preclude a
 25

26 ⁴ Section 203 addresses "[i]f an employer willfully fails to pay, without abatement or reduction, in
 27 accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is
 28 discharged or who quits ..." Cal. Lab. Code § 203(a).

1 finding that a good faith dispute did exist. ..." Cal. Code Regs., tit. 8, § 13520. Here,
 2 as discussed in our opening briefing and further below, it is uncontroverted that BSN
 3 had a *good faith dispute regarding whether Plaintiffs were "wholesale sales*
 4 *representatives" under the Act*. Indeed, although they have raised the Section 203
 5 "willfully" standard as applying under the Act, Plaintiffs have not offered a scintilla
 6 of evidence that BSN's dispute with them on this issue was not in good faith.

7 Therefore, Plaintiffs cannot establish the essential element of BSN "willfully"
 8 failing to enter into written contracts with them as a matter of law, and summary
 9 judgment should be granted in favor of BSN.

10 **5. The Claim Fails Because Plaintiffs Were Not "Wholesale**
 11 **Sales Representatives" Protected Under The Act**

12 **a. The Exclusion For Direct Sales Of Products To Ultimate**
Consumers Is Not Limited To "Door-To-Door" Sales

13 As we discussed in our opening briefing, Plaintiffs were not "wholesale sales
 14 representatives" protected under the Act because their sales at issue were "direct
 15 sale[s] of [BSN's] products to the *ultimate consumer*."⁵ Cal. Civ. Code § 1738.12(e)
 16 (emphasis added). Without even mentioning (never mind discussing) any of BSN's
 17 cited cases, Plaintiffs argue that this is "ridiculous." Indeed, they offer no admissible
 18 evidence or legal authority in support of their position – just their own *ipse dixits* and
 19 improper *conclusory* statements to the effect that they *were* "wholesale sales
 20 representatives" and that it was BSN's customers' *patients* who were the "ultimate
 21 consumers" of its products. *See Total Control, Inc. v. Danaher Corp.*, 2004 WL
 22 1878238, *4 (E.D. Pa. 2004) (summary judgment granted for defendants where
 23 plaintiffs offered only "conclusory" statements that they solicited wholesale orders).

24 _____
 25 ⁵ By this exclusion from the definition of a "wholesale sales representative," the Act deals
 26 exclusively with sales representatives that move goods in the "wholesale" marketplace, and not
 27 via retail transactions like those at issue here. *See, e.g., Lee v. Thermal Engineering Corp.*, 372
 28 S.E.2d 298, 305 (S.C. App. 2002) ("[I]t is clear that in its use of the word "wholesale" the
 legislature intended to address a problem in the wholesale distribution system" and did "not
 intend to create additional remedies for all salespersons who are paid by commission").

1 Incredibly, Plaintiffs even argue that their damning deposition testimony admissions
 2 on these issues should be disregarded because they “are contradicted by the
 3 declarations” they submitted in opposition to this motion. Oppos. at 10:1-9. Not so.
 4 *See Kennedy, supra*, 952 F.2d at 266-67 (declarations contradicting deposition
 5 testimony cannot be used to raise a triable issue of fact).

6 To this end, Plaintiffs argue only that “logically,” the ultimate consumer sales
 7 exclusion “is intended to apply to ‘door-to-door’ and other similar-type sales
 8 people.” Oppos. at 6:23-25. Beyond this “logic” argument, Plaintiffs offer no
 9 authority supporting such a narrow construction of this exclusion from the Act’s
 10 definition of a “wholesale sales representative,” other than that the Act’s stated
 11 purpose is to provide “unique protection from unjust termination of the territorial
 12 market areas.”⁶ Cal. Civ. Code § 1738.10. However, while no California court has
 13 yet interpreted the meaning of “ultimate consumer” for purposes of this exclusion,
 14 courts in other jurisdictions have had no trouble finding that sales representatives
 15 who worked in exclusive territorial markets nevertheless were not protected under
 16 that jurisdiction’s independent sales representative protection statute.

17 For example, the South Carolina Court of Appeal interpreted “ultimate
 18 consumer” as used in its statute, which was in all material respects identical to
 19 California’s Act, as excluding from the definition of “wholesale sales representatives”
 20 those who solicited orders for control panels from manufacturers, who in turn used
 21 the control panels as components in their manufacturing equipment. *See Lee v.*
 22 *Thermal Engineering Corp.*, 372 S.E.2d 298, 305 (S.C. App. 2002). Indeed, the sales
 23 representative in *Lee* was *not* a “door-to-door” salesperson and his market covered
 24 Thermal Engineering’s Southeastern United States territory. *Id.* at 299.

25
 26
 27 ⁶ Remarkably, notwithstanding this stated purpose of the Act, its provisions provide absolutely no
 28 protection against the termination (unjust or otherwise) of a wholesale sales representative’s
 “territorial market areas.”

1 In *Zauderer Assoc., Inc. v. C&J Industries*, 378 F.Supp.2d 682 (D.S.C. 2005),
 2 the District Court held that a sales representative who sold molded plastic products to
 3 manufacturers, who then incorporated those parts into other products, was not a
 4 "wholesale sales representative" under South Carolina's statute because they were in
 5 fact taking orders for the direct sale of the molded plastic products to the ultimate
 6 consumer or end user. *Id.* at 689 (the "pertinent question" was whether plaintiffs
 7 "solicited orders from individuals or corporations who were the *ultimate consumer* or
 8 *end user* of C&J's products"). Again, the *Zauderer* sales representative was *not* a
 9 "door-to-door" salesperson and he was C&J's exclusive sales agent in a large
 10 territory which included Alabama, Florida, Georgia, Mississippi, North Carolina,
 11 South Carolina, Tennessee, and Virginia. *Id.* at 683.

12 Similarly, in *Brooks*, *supra*, 2008 WL 2826392, which Plaintiffs cite in their
 13 Opposition, the District Court had no problem finding that Brooks, despite all his
 14 time spent developing his sales territory in addition to developing the product being
 15 sold, was *not* a "wholesales sales representative" under the Act, even though he was
 16 not a "door-to-door" salesperson. Plaintiffs are thus similarly situated to the sales
 17 representatives in these cases, who were found to not be protected by the Act or
 18 statute at issue based on their making direct sales to the ultimate consumer, even
 19 though they were not "door-to-door" salespersons.

20 **b. *The Hospitals And Medical Groups That Purchased***
 21 ***BSN's Products Were The "End Users" And "Ultimate***
 22 ***Consumers" Of Those Products, Which They Bought For***
Purposes Other Than Resale

23 Realizing that they have significant problems on the "ultimate consumer" issue
 24 because BSN charges sales tax on taxable products sold to its customers which do
 25 not have tax-exempt status, Plaintiffs attempt to avoid it altogether by asserting that
 26 "the taxation issue resolves nothing" and "whether tax was charged to or by any
 27 given healthcare provider ... is a non-sequitur: the fact of tax being charged to an
 28 entity does not make the entity the 'ultimate consumer' under [the Act]." *Oppos.* at

1 8:18-22. Yet, Plaintiffs' contention in this regard is belied by their reliance on three
 2 BSN invoices attached as Exhibit A to their opposing declaration of Thomas L.
 3 Kelley, on which no sales tax was charged to the customer for the products invoiced.⁷

4 Indeed, Plaintiffs ignore BSN's cited cases holding that ultimate consumers
 5 are, as that term is interpreted by case law, the "end users" or "retail customers" of
 6 those products. *See, e.g., Total Control, Inc.*, 2004 WL 1878238, *3 ("ultimate
 7 consumer" means "*retail customer*" for purposes of Pennsylvania sales representative
 8 act); *Zauderer*, 378 F.Supp.2d at 689 (equating "end user" with "ultimate
 9 consumer"); *Metric Man v. Unemp. Ins. Appeals Bd.*, 59 Cal.App.4th 1041, 1050
 10 (1997) (a retailer sells to ultimate consumers, which buy products for purposes other
 11 than resale to a third party). "Ultimate consumers" also include those who purchase
 12 products which they then incorporate into other products, rather than reselling the
 13 original products. *Zauderer*, 378 F.Supp.2d at 689; *Lee*, 372 S.E.2d at 305. Thus,
 14 retail customers normally pay sales tax on items they buy because they are purchased
 15 for purposes other than resale. *See* Cal. Rev. & Tax. Code § 6015 (a "retail sale" is
 16 "a sale for *any purpose other than resale in the regular course of business*")
 17 (emphasis added); Cal. Board of Equalization Response to Inquiry, *available at*
 18 <http://www.calpaca.org/docs/CASalesandUseTax.pdf> (all retail sales of goods are
 19 charged sales tax unless exempted by law).

20 Plaintiffs rely only on BSN's own cited case of *AMP, Inc. v. Commonwealth of*
 21 *Pennsylvania*, 852 A.2d 1161, 1166 n. 4 (Pa. 2004), which provides no support for
 22 their unsubstantiated conclusion that "it is clear that the patient is the 'ultimate
 23 consumer' – not the hospital/healthcare provider." *Oppos.* at 9:1-9. Based on the
 24

25 ⁷ As discussed in BSN's accompanying Supplemental Declaration of Bryan Sherrel, the customer
 26 in question does not have tax-exempt status with BSN, but the products invoiced are not subject
 27 to sales tax under California law. Moreover, as discussed in the accompanying Supplemental
 28 Declaration of Jenny M. Beck, the invoiced customer is not even at issue in this action because it
 never signed a LOC.

1 AMP court's use of the dictionary definitions of the words "ultimate" and
2 "consumer," Plaintiffs simply argue that "consumer" means one who "buys goods or
3 services for personal, family or household use, with no intention of resale" and that
4 "ultimate" refers to a point "by which a process or series comes to an end." *Id.*
5 However, under these definitions, BSN's hospital and medical group customers that
6 purchase its products are in fact the "ultimate consumers" of those products because
7 they buy them for personal use by their patients when the process of providing them
8 medical treatment services comes to an end. *See* Defendant's Responses to Plaintiffs'
9 Statement of Genuine Issues filed herewith ("RGI's") 9, 13-16. In other words, the
10 medical professional "uses" the product to provide the medical treatment services to
11 the patient, and it simply remains on the patient until the treatment is completed.

12 Moreover, Plaintiffs conveniently ignore that, immediately after referencing
13 these definitions, the AMP court cited *Paper Products Co. v. City of Pittsburgh*, 183
14 Pa.Super. 234, 246 (1957), for the proposition that "the person buying from a retailer
15 is the ultimate user or consumer of the article or commodity and does not sell it
16 again." (Emphasis added). Thus, the AMP court simply engaged in a plain meaning
17 analysis of the term "ultimate consumer" in concluding that it refers to retail
18 customers or those that *do not purchase exclusively for resale*, which is consistent
19 with the foregoing analysis and application of the dictionary definitions, and
20 instructive for interpreting the meaning of the same term under the Act. *See Total*
21 *Control, Inc., supra*, 2004 WL 1878238, *3 (although AMP interpreted "ultimate
22 consumer" as used in tax code, same interpretation applied to sales representative act
23 because based on its plain meaning and common usage).

24 Of course, this is also wholly consistent with Plaintiffs' admissions in their
25 deposition testimony that the hospitals and medical groups that purchased BSN's
26 products were the "end users" of those products, as we discussed in our opening
27 briefing, which leads to only one legal conclusion: that those customers were, in
28 fact, the "ultimate consumers" of those products under the Act. *Zauderer*, 378

1 F.Supp.2d at 689 (equating "end user" with "ultimate consumer"). Realizing the
 2 death-knell that their deposition testimony is to their purported claim, Plaintiffs argue
 3 that their "end user" admissions are "meaningless statements" and improperly offer
 4 what they admit are *contradictory declarations* which make nothing more than
 5 *conclusory* statements that it was the customers' *patients* who "ultimately consumed"
 6 BSN's products purchased by its customers. Oppos. at 10:1-9.

7 Indeed, what is truly "meaningless" are Plaintiffs' self-serving, sham
 8 declarations which *intentionally contradict* their sworn deposition testimony in an
 9 improper attempt to raise a triable issue of fact where none exists. *Radobenko*,
 10 *supra*, 520 F.2d at 543-44. As the Ninth Circuit has articulated:

11 [I]f a party who has been examined at length on deposition could raise
 12 an issue of fact simply by submitting an affidavit contradicting his own
 13 prior testimony, this would greatly diminish the utility of summary
 14 judgment as a procedure for screening out sham issues of fact.
Kennedy, supra, 952 F.2d at 266-67. *See also Radobenko, supra*.

14 Here, Plaintiffs do not deny (because they cannot) that they unequivocally
 15 testified in their depositions that the hospitals and medical groups they sold BSN
 16 products to were the "end users" of those products. Instead, now that they realize the
 17 import of their admissions, Plaintiffs claim they "did not mean they were 'ultimate
 18 consumers'" and that BSN has taken their deposition testimony "out of context." GI's
 19 174-175. Tellingly, however, Plaintiffs have not offered a single additional excerpt
 20 of their deposition testimony to show a different context in which it should be taken.
 21 Therefore, Plaintiffs' attempted disclaimer of their prior testimony should be *rejected*.

22 Plaintiffs' sham declarations also should be disregarded because they offer
 23 only *unsubstantiated legal contentions* and *denials* rather than *factual evidence*,
 24 which cannot be used to create triable issues of material fact. *See, e.g., Radobenko*,
 25 520 F.2d at 543 ("Mere allegations, and denials ... do not alone establish the
 26 existence of a genuine dispute of material fact [because] [s]uch allegations and
 27 denials thereof merely frame the ultimate issues to be determined by applying the
 28 relevant rules of law to established facts."). Here, "end user" is a factual description

1 of BSN's customers, which establishes the legal conclusion that they are the "ultimate
 2 consumers" of its products. This description is well-supported by Plaintiffs' related
 3 deposition testimony that they not only sold BSN's products to its hospital and
 4 medical group customers that purchased them, but they also trained those customers
 5 on how to *use* those products in providing medical treatment services to their
 6 patients. RGI 8.

7 Similarly, Plaintiffs' sham declarations make an unavailing attempt to explain
 8 away their damning deposition testimony that BSN's customers at issue were *not*
 9 *retailers*, by claiming that what they "intended" to say was that the customers did not
 10 resell the products to *other hospitals and doctors*. Notwithstanding that Plaintiffs did
 11 not take the required steps to correct their sworn deposition testimony if it was not
 12 truthful, they have *failed* to provide any *facts* which would raise a triable issue of fact
 13 to controvert BSN's position that its hospital and medical group customers were were
 14 *BSN's retail customers which did not purchase its products for the purpose of resale*.
 15 For example, they offer a copy of an internal form from Pomona Valley Hospital
 16 Medical Center with the phrase "Ortho Charges" printed in the bottom-right-section,
 17 (Ortega Decl., Ex. A), but this document is meaningless for several reasons. First, as
 18 set forth in BSN's accompanying evidentiary objections and motion to strike, and its
 19 Supplemental Kane Declaration, Plaintiffs never produced this document during
 20 discovery. Second, as set forth in BSN's Supplemental Beck Declaration, this
 21 customer did not even sign an LOC at issue in this case. Third, it does nothing to
 22 disprove the material fact that this customer did *not* purchase BSN's products *only for*
 23 *purposes of resale*.⁸ *See Paper Products Co. v. City of Pittsburgh*, 130 A.2d 219,
 24 224 (Pa. 1957) (retail customers are the "ultimate user[s]" of a product as opposed to
 25 _____

26 ⁸ Plaintiffs also offer three BSN invoices issued to Lawrence Ortho Appliance, (Kelley Decl., Exh.
 27 A), which are meaningless and objectionable for these same reasons. *See* BSN's accompanying
 28 evidentiary objections and motion to strike; Suppl. Sherrel Decl.; Suppl. Beck Decl.; Suppl. Kane
 Decl.; fn. 7, *supra*.

1 those buying "*only* for the purpose of selling the [product] again") (emphasis added).

2 Finally, Plaintiffs purport to rely on Cal. Rev. & Tax. Code § 6006, which
3 defines "sale," but it is unclear why they do so. BSN does not contend that its
4 customers' patients and/or their insurance companies do not pay for the BSN
5 products its customers use in providing medical treatment services to their patients.
6 What BSN does contend, however, and Plaintiffs do not controvert, is that its
7 customers *do not purchase BSN products for the sole purpose of resale* (or for any
8 resale purpose). Indeed, Plaintiffs testified in their depositions that BSN's products
9 were purchased by its customers *for the purpose of providing medical treatment*
10 *services*, and that any charges to patients for the cost of those products was only to
11 *holistically compensate* the customers for the *entire gamut of medical treatment*
12 *services* provided. RGI 7.

13 Accordingly, no genuine triable issue of material fact exists as to BSN's
14 customers at issue in this action being the "ultimate consumers" of its products sold
15 by Plaintiffs. Therefore, summary judgment should be granted in favor of BSN.⁹

16 **6. Plaintiff TKA's Claims Are Barred Because The TKA-Parker**
17 **Agreement Originated In 1988 And The Act, Which Does Not**
Apply Retroactively, Became Effective In 1991

18 As discussed in our opening briefing and further above, TKA's purported claim
19 under the Act could *only* be based on BSN's alleged willful failure to enter into a
20 written contract with TKA. It is uncontroverted that the TKA-Parker Agreement is
21 the only operative agreement governing TKA's relationship with BSN, and that TKA
22 entered into that Agreement in 1988. GI's 21-32. Yet, TKA is indeed suing BSN for
23 _____

24 ⁹ Plaintiffs purport to request an "opportunity to conduct additional discovery and present further
25 evidence on this issue" but fail to provide *any* evidence to meet their high burden for being
26 allowed to do so. Oppos. at 10:26, fn. 3. Rule 56 was not intended to serve as the road to a
27 fishing expedition. "The party seeking to conduct additional discovery [must] put forth sufficient
28 facts to show that the evidence sought exists." *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995)
(quoting *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987)). Here, although
Plaintiffs' purported request cites to a "Humphrey Dec.," no such declaration was submitted and
Plaintiffs wholly fail to identify the evidence that they seek *and any evidence that it even exists*.

1 conduct that occurred prior to 1991, when the Act became effective, by asserting that
 2 the TKA-Parker Agreement *should have been in writing* to comply with the Act.
 3 Thus, TKA is attempting to hold BSN liable for conduct (entering into the *oral* TKA-
 4 Parker Agreement) that was lawful at the time it occurred in 1988.

5 TKA fails to address any of BSN's cited authorities as to why the Act does not
 6 and cannot be applied retroactively to the TKA-Parker Agreement, as TKA is
 7 attempting to do. TKA's only "argument" in opposition is that BSN has never been
 8 provided an "exemption" from complying with the Act after it became effective. Of
 9 course, BSN has never claimed to have an "exemption" from the Act's provisions but,
 10 instead, has shown that those provisions cannot be applied retroactively to its pre-
 11 existing TKA-Parker Agreement. TKA has not controverted any of BSN's facts or
 12 law supporting this conclusion. Therefore, summary judgment should be granted
 13 against TKA on this basis as well.

14 **D. The Third Cause Of Action For Breach Of Fiduciary Duty Fails As**
 15 **A Matter Of Law**

16 Plaintiffs' entire opposition to summary judgment being granted on their
 17 breach of fiduciary duty claim rests on paragraph 10 of Ortega's declaration, where
 18 he claims he was "told by Mr. Keytel on several occasions that BSN and I 'are in this
 19 together' and 'will jointly benefit' from getting the LOCs in place." Ortega Decl., ¶
 20 10; Opp. at 15:23-26. As a preliminary matter, this self-serving declaration should
 21 be rejected because it contradicts Plaintiffs' deposition testimony. Moreover, it
 22 provides absolutely no support for TKA's breach of fiduciary duty claim because,
 23 even if the statements recited therein were made, it *still* fails to establish the essential
 24 elements of a *joint venture*, which is the basis for the claim. It is uncontroverted that
 25 Plaintiffs (1) did not have any agreement with BSN for the sharing of losses and (2)
 26 had no power or authority to direct or manage the operations of BSN. GI's 44-45,
 27 60-61; *Los Angeles Memorial Coliseum Com'n v. N.F.L.*, 726 F.2d 1381, 1390 (9th
 28 Cir. 1984) (sharing of "profits and losses" is required for joint ventures); *Spier v.*

1 *Lang*, 4 Cal.2d 711, 716-17 (1935) (essential element of joint venture is right of joint
 2 participation in management and control of business). It is also uncontroverted that
 3 Plaintiffs did *not* have a *confidential* relationship with BSN. GI's 46, 62; *Rickel v.*
 4 *Schwinn Bicycle Co.*, 144 Cal.App.3d 648, 654 (1983) ("A 'fiduciary relation' in law
 5 is ordinarily synonymous with a 'confidential relation' ... founded upon the trust or
 6 confidence reposed by one person in the integrity and fidelity of another ...").

7 Therefore, Plaintiffs' breach of fiduciary duty claim fails as a matter of law and
 8 summary judgment should be granted in favor of BSN.

9 **E. The Fourth Cause Of Action For Quantum Meruit Fails As A**
 10 **Matter Of Law**

11 **1. Plaintiffs Do Not Dispute That Their Compensation Terms**
Were Already Covered By Their Oral Parker Agreements

12 As discussed in our opening briefing and further above, and as Plaintiffs admit
 13 in their Opposition, Plaintiffs' respective Parker Agreements governed the terms of
 14 their compensation with BSN, and they had no agreement for the payment of
 15 commissions on sales made to customers post-termination. Thus, as a matter of law,
 16 Plaintiffs cannot assert a valid quantum meruit claim for commissions on sales made
 17 post-termination. *See, e.g., H.F. Fites Co. v. Harris Mfg. Co.*, 89 Cal.App. 427, 435
 18 (1928) (reversing trial court decision and noting that "there is a marked inconsistency
 19 in the findings of the court in this, that the plaintiff could not recover on a contract ...
 20 and also on a quantum meruit"). As the court in *Thacker v. American Foundry*, 78
 21 Cal.App.2d 76, 86 (1947), described it:

22 If there is a valid express contract his recovery must rest upon and be
 23 measured by its terms. The compensation agreed upon in the express
 24 contract ... [binds] both parties ... and neither may, after the
 25 establishment of such a contract, recover different or a larger sum just
 because such a sum would have been recoverable had the parties not
 theretofore agreed upon express terms.

26 As such, it is Plaintiffs who are "misguided" in arguing that "this [quantum
 27 meruit] claim may clearly be presented as an alternative to the breach of contract
 28 claim up until" a "verdict" in this case. Oppos. at 15:19-22. Indeed, their argument

flies in the face of the purpose of summary judgment. *See Jacobsen v. Filler*, 790 F.2d 1362, 1365 n. 4 (9th Cir. 1986) ("[T]he purpose of summary judgment is to head off a full-scale trial by conducting a trial in miniature"). Therefore, having admitted to the validity and scope of their respective Parker Agreements, Plaintiffs' quantum meruit claim fails as a matter of law and summary judgment should be granted in favor of BSN.

2. Plaintiffs And BSN Entered Into Valid Novation Agreements, Which Are Supported By Adequate Consideration

All of the elements required for a valid novation agreement are present here. As Plaintiffs concede in their Opposition, "summary judgment may be granted in appropriate [novation] cases ... Courts may take into consideration the conduct of the parties, particularly where, as here, the subsequent agreement is oral. ... If the intent to abandon [the original agreement] can be ascertained from the acts and conduct of the parties the same result will be attained. Abandonment may be implied from surrounding facts and circumstances." *Oppos.* at 17:2-15 (internal quotations and citations omitted). This case is a textbook example of such "abandonment" in that Plaintiffs' intent to abandon their respective Parker Agreements is evidenced by their acceptance of post-termination commissions from June 2006 that they did not earn, but were nevertheless paid by BSN in consideration for termination of any remaining obligations under their original Parker Agreements (the "Novation Agreements"). They then waited almost two full years to bring this action, without first making any protest or complaint to BSN. *GI's* 171-172. This silence and delay, particularly after accepting post-termination commissions that they admit they were never entitled to under their Parker Agreements, unequivocally establishes Plaintiffs' intent to substitute the Novation Agreements for any remaining obligations they claim existed under the Parker Agreements. *RGI's* 25, 51, 169-172.

Plaintiffs' argument that they "had no opportunity to provide any consideration" is belied by their admissions that their Parker Agreements did not

1 provide for paying them commissions on post-termination sales, and their acceptance
2 of commissions through the *end* of June 2006 on both direct and indirect sales of
3 BSN products despite the fact that they were released in *mid*-June 2006. BSN's
4 payment of commissions to them on sales made between when they were released
5 and the end of June 2006, notwithstanding not being obligated to do so, was adequate
6 consideration for the Novation Agreements. Indeed, Plaintiffs offer no facts which
7 controvert that fact that they "accepted the commission payments under the Novation
8 Agreement as payment in full of any and all commission payment obligations to it."
9 GI's 169-170. Instead, they just make the conclusory statements that the Novation
10 Agreements "lacked ... mutual assent and consideration," which are legal
11 conclusions rather than facts that do not raise triable issues of fact. *Id.*; *Radobenko*,
12 520 F.2d at 543. Notwithstanding, sufficient consideration exists, as there is not a
13 high threshold for its sufficiency. It may be forbearance to sue on a claim, an
14 extension of time, or any other giving up of a legal right, in consideration of some
15 promise, and even the slightest forbearance will suffice. *See, e.g., West v. Stainback*,
16 108 Cal.App.2d 806, 814 (1952) (dismissing a will contest in consideration of
17 promise to leave property by will); *Krobitzsch v. Middleton*, 72 Cal.App.2d 804, 809
18 (1946) ("Even though forbearance is for one day only, there is sufficient
19 consideration as the law does not weigh the quantum.").

20 Here, Plaintiffs' quantum meruit claim arose, if at all, when BSN released them
21 from its sales force. *Long v. Rumsey*, 12 Cal.2d 334, 347 (1938). Plaintiffs engaged
22 in discussions with Keytel, immediately following his notifying them of their release,
23 about an agreement on paying them commissions on sales made post-termination. In
24 the course of these discussions, Plaintiffs and BSN reached an agreement that
25 Plaintiffs would be paid commissions on post-termination sales made through the end
26 of June 2006. Thus, although BSN was under no obligation to pay Plaintiffs
27 commissions on any post-termination sales, it entered into the Novation Agreements
28 with them and *gave up its right* in that regard for post-termination sales through the

1 end of June 2006. Likewise, since Plaintiffs claim that they were entitled to such
 2 commissions, they entered into the Novation Agreements and *gave up their rights* to
 3 any commissions on sales made after June 2006, and they accepted BSN's additional
 4 commission payments as BSN's fulfillment of any financial obligations it may have
 5 had to them.

6 Therefore, valid novation agreements were entered into between Plaintiffs and
 7 BSN, their quantum meruit claim fails as a matter of law, and summary judgment
 8 should be granted in favor of BSN.

9 **F. Plaintiffs Offer No Opposition To Summary Judgment Being**
 10 **Granted On The Fifth Cause Of Action For An Accounting, Which**
 11 **Fails As A Matter Of Law**

12 Plaintiffs offer no opposition to the Court granting summary judgment in favor
 13 of BSN on their purported claim for an accounting. Regardless, as discussed in our
 14 opening briefing, this claim is entirely derivative of Plaintiffs other claims, which fail
 15 as a matter of law, and it is uncontroverted that Plaintiffs cannot demonstrate any
 16 need for an accounting. Therefore, summary judgment should be granted in favor of
 17 BSN on this claim.

18 **III. CONCLUSION**

19 For all of the foregoing reasons, and those set forth in the accompanying
 20 supporting documents, the Court should grant BSN's motion for summary judgment.

21 DATED: June 22, 2009

McGUIRE WOODS LLP

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